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Supreme Court, U.S.

FILED

APR 30 1990

JOSEPH E. SPANIOLO, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

GREGORY GATES,
Petitioner

v

STATE OF MICHIGAN,
Respondent

ON APPEAL FROM THE
SUPREME COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FEDERAL RULE OF COLLATERAL ESTOPPEL PRECLUDES A CRIMINAL TRIAL OF AN INDIVIDUAL CHARGED WITH SEXUAL ABUSE WHERE THE ISSUE OF SEXUAL ABUSE WAS FULLY LITIGATED BETWEEN THE SAME PARTIES IN THE JUVENILE DIVISION OF PROBATE COURT AND THE JURY RETURNED A GENERAL VERDICT IN FAVOR OF THE DEFENDANT IN THE JUVENILE COURT

LIST OF PARTIES

The parties in this proceeding in the Michigan Supreme Court were as follows:

1. People of the State of Michigan,
Plaintiff-Appellant.
2. Gregory Gates,
Defendant-Appellee.

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PETITION FOR WRIT OF CERTIORARI TO THE
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The Petitioner, Gregory Gates, by his attorney, Nicholas Smith, prays that a Writ of Certiorari issue to review the Opinion of the Michigan Supreme Court filed on March 5, 1990.

OPINIONS AND ORDERS BELOW

The Opinion of the Michigan Supreme Court, filed March 5, 1990, is set forth in Appendix A.

The published Opinion of the Michigan Court of Appeals, filed May 2, 1988, is set forth in Appendix B.

The Opinion of the Honorable Russell E. Noble, Circuit Judge in the Circuit Court for the County of Jackson, dated December 3, 1986, is set forth in Appendix C.

The Order of Dismissal from the Circuit Court for the County of Jackson, dated December 17, 1986, is set forth in Appendix D.

JURISDICTION OF THE COURT

It is from the Opinion of the Michigan Supreme Court that Petitioner files this Petition for Writ of Certiorari.

This Court has jurisdiction to grant this Petition for Certiorari pursuant to 28 U.S.C. Section 1257(a) and Mills v Alabama, 384 U.S. 214 (1965) and Radio Station WOW, Inc. v Johnson, 326 U.S. 120 (1945).

STATEMENT OF THE CASE

In November, 1985, Petitioner and his wife were divorced. One child, a daughter named Nicole, was born of this union. At the time of the divorce Nicole was three years old. Both Petitioner and his wife had joint custody of Nicole however, Nicole resided with her mother, Petitioner's ex-wife.

On or about February 18, 1986, the Michigan Department of Social Services caused the Jackson County Prosecutor to file a Petition alleging that Defendant sexually abused his daughter. The Petition states in pertinent part:

"On or about 02-13-86, Nicole Gates was interviewed by petitioner. During this interview, Nicole stated that her father had touched her 'pee pee real hard.' While stating this, Nicole showed petitioner what she meant by placing both of her hands on her vaginal area. Nicole further illustrated this while using the sexually explicit dolls by placing the adult male doll's hand on her (Nicole's) vaginal area. Nicole stated that when this occurred, she had no clothes on.

Nicole further revealed that she had not told her mother of her father's

actions because she was afraid of what her father would do.

Due to the aforementioned information, I am respectfully requesting court intervention in this matter."

The statutory grounds for Juvenile Court jurisdiction are set forth in MCLA 712 A.2. At the time the Petition was filed, the statute read in pertinent part:

"Except as otherwise provided herein, the juvenile division of the probate court shall have:

* * *

(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

* * *

"(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian, or other custodian, is an unfit place for such child to live in."

On May 2, 1986, Jackson County Prosecutor filed a Complaint and Warrant charging Defendant with second-degree criminal sexual conduct, in violation of MCLA 750.520c(1)(a), which provides in pertinent part:

"(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

"(a) That other person is under 13 years of age."

As defined by MCL 750.520a(k); MSA 28.788(1)(k), "sexual contact" includes "the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification."

The Complaint is set forth in Appendix E.

On May 27, 1986, Defendant's preliminary examination in the criminal charge was conducted and Defendant was bound over for trial in the Circuit Court.

On June 16, 1986, the Judge for the Probate Court for the County of Jackson - Juvenile Division allowed the Jackson County Prosecutor to amend the Petition upon which Petitioner was to be tried in that Court. The amended Petition read:

"Nicole Gates (DOB: 3-29-82)

Allegations: On or about February 13, 1986, Nicole Gates was interviewed by petitioner, during this interview, Nicole Gates stated that her father had touched her 'pee pee real hard.' While stating this, Nicole showed petitioner what she meant by placing both of her hands on her vaginal area. Nicole further illustrated this while using the sexually explicit dolls by placing the adult male doll's hand on her (Nicole's) vaginal area. Nicole stated that when this occurred she had no clothes on.

It is also alleged that: This touching by the father could be reasonably construed as being for purposes of sexual arousal or gratification.

Nicole further revealed that she had not told her mother of her father's actions because she was afraid of what her father would do.

Due to the aforementioned information, I am respectfully requesting Court intervention in this matter." (Emphasis supplied).

The Amended Petition is set forth in Appendix F.

Throughout the trial it was the prosecutor's theory and stated position that Defendant sexually abused his daughter.

In his opening statement the Prosecutor stated:

"Basically, what the People's proofs are going to be is: we're going to call Nicole Gates, who's four years old at this time, and she's going to get on the witness stand and she's going to tell you basically what happened when she went to visit her daddy; she's going to tell you about a touching that her father did, I believe she calls it in the pee pee area, and she'll show on her doll where that area is, she'll --

she'll demonstrate that to you, as to how her father touched her, and then she'll tell you a little bit about the touching as to how it felt, where in the house it occurred, what happened after the touching, what she --- what she did, what the father did and what the father said right after the touching, which is very important, and anything else that the father said relative to --- relative to the touching that occurred in the house while she went to visit him.

The People's proofs will show that Nicole will tell you about the touching and that right after the touching the father supposedly said: "don't tell mommy otherwise mommy won't let you come to see me anymore." Now that's a very important statement. You should focus in on that statement along with the touching that the father did and what Nicole's going to show you.

It's the People's position that touching could be reasonably construed as being for purposes of sexual arousal or sexual gratification. There's no answer for that touching other than that it was for sexual arousal or gratification. The statement comes in, as far as what the father said: don't tell mommy otherwise mommy won't let you come back here anymore. That's very important because that statement is coming from the defendant as Nicole will tell you, and that statement kind of implies or infers on the part of the --- of the father that he knew he did something wrong, he knew he did it for purposes of sexual arousal or gratification, otherwise if it was something --" (Probate Court Adjudication Hearing Trans. [PATr] pp. 17-18)

The attorneys for the mother and for the Defendant made references to the allegations in the amended complaint in their opening statements (PATr pp. 20; 29-32). All the witnesses called by the prosecution testified about the alleged touching or about being told of the alleged touching.

The Court instructed the jury as to elements which are necessary for the minor to come within the Court's jurisdiction. The Court's instruction included the following:

"A child comes within the jurisdiction of the Court if that child's home or environment, by reason of neglect, cruelty, criminality or depravity on the part of a parent makes that place unfit for the child --- an unfit place for the child to be. . .

The legal definition of cruelty is the same as the common understanding of the word cruelty. It implies physical or --- or emotional mistreatment of a child.

Depravity means a moral corrupt act or practice.

The legal definition of criminality is the same as the common understanding of the word criminality. Criminality is present when a person vio-

lates a criminal law of the State of Michigan or of the United States. Whether a parent's violation of the criminal law renders the home or environment of the child an unfit place for the child is for you to decide based upon all of the evidence in the case. (PATr pp. 430-431)

The Court also instructed the jury on the prosecutor's theory of the case which was adopted by the guardian ad litem and the attorney for the mother. The Court stated:

"It is their joint theory of the case that Nicole Gates was born on March 29th of 1982, has visited her father, Gregory Gates and that at least on one occasion Gregory Gates has touched his daughter real hard in the vaginal area while she was asleep in the living room. While this occurred Nicole woke up and became mad and went to her room to --- to lock the door. Her father went and got the keys and opened the door and told her not to tell mommy or she wouldn't be able to come to see him anymore. At a Department of Social Services visit he also told her that she should not tell the Judge or he would go to jail. The

People believe that the touching was for the purposes of sex --- sexual gratification or arousal. Now, that is the theory of the People, and Mr. --- and the Guardian and the mother. (PATr pp. 432-433) (Emphasis supplied)

On June 17, 1986, the jury returned a general verdict in favor of Defendant. (PATr p. 442).

After the Jackson County Prosecutor's post verdict motions failed to set aside the verdict Petitioner moved to dismiss the criminal case on the grounds that the federal doctrine of collateral estoppel and the Michigan appellate court's decision in People v Watt, 115 Mich. App. 172; 320 N.W.2d 333 (1982) barred the prosecution of Petitioner on the criminal charges in Circuit Court. On December 17, 1986, Petitioner's Motion was granted. The Jackson County Prosecutor appealed from that decision.

The Court of Appeals affirmed the Circuit Court's dismissal, People v Gates, 168 Mich. App. 384, 386; 423 N.W. 2d 668, 669 (1988). The Court, in affirming, cited the following facts:

"On June 16 and 17, 1986, a jury trial in the Jackson Probate Court was held on the juvenile petition. In his

opening statement, the prosecutor explained that he would show that defendant had touched Nicole in a sexual manner and this warranted the probate court's jurisdiction and intervention. During the prosecution's proofs, Nicole testified that she was asleep in a chair at defendant's home when he touched her hard in the vaginal area, awakening her. She also said that defendant told her not to tell her mother, from whom defendant was divorced and shared Nicole's custody, or the judge about the touching. A Catholic Social Services therapist testified that in her opinion Nicole had been sexually molested. Deborah Gates (Nicole's mother) and another social worker testified regarding the child's marked mood change. No other evidence was presented to show neglect, cruelty, or defendant's unfitness to parent, aside from the alleged sexual touching.

The probate court instructed the jury that if it found, by a preponderance of the evidence, that defendant's home was unfit for Nicole because of neglect, cruelty, criminality, or depravity by defendant then it should find that the court has jurisdiction

over the child. The jury returned a verdict that the court did not have jurisdiction over Nicole. When polled, all six jury members agreed that they believed Nicole had not been neglected in the manner alleged by the Department of Social Services (DSS).

The Court of Appeals, in conformity with and following People v Watt, 115 Mich. App. 172; 320 N.W.2d 333 (1982), affirmed the Circuit Court's dismissal of the criminal sexual conduct charges on grounds of collateral estoppel. The Court, in holding, stated:

"We hold that Watt, supra, is dispositive of this appeal. The basis of the juvenile petition against defendant was his alleged sexual abuse of Nicole. No other allegations of abuse, neglect, or unfitness were made or proven at the adjudicative hearing. Thus, the subject matter of the petition was the same as the criminal charge. Moreover, it is clear that the issue was fully litigated in the probate court as the DSS presented several witnesses in support of its case. Despite the DSS's efforts, the jury -- applying a lesser standard than required in a criminal proceeding -- did not

find defendant guilty of the alleged sexual assault. Logic dictates that defendant could not be found guilty of the same misconduct under the higher standard of proof. Finally, we agree that the DSS and the county prosecutor, being creatures of the same sovereign, are the same party for purposes of collateral estoppel. For these reasons, the trial court correctly ruled that the doctrine of collateral estoppel barred defendant's prosecution on charges of second-degree CSC." 168 Mich. App. at 388; 423 N.W.2d at 669-670.

The Michigan Supreme Court granted the Prosecutor leave to appeal and set a briefing schedule. The cause was argued on May 2, 1989. On March 5, 1990, the Michigan Supreme Court with two Justices dissenting entered an opinion reversing the lower Court's decision.

The Michigan Supreme Court in its decision recognized that the parties in the probate court and in the criminal case were the same. The Court stated:

"Although the named-party plaintiff in the instance case, (the criminal case), is the People of the State of Michigan, in practical terms the party

against whom collateral estoppel is asserted is the Jackson County Prosecutor, who also represented the Department of Social Services in the probate court proceeding." (op. p.7)

The Court recognized that the factual focus of the trial was Petitioner's alleged sexual abuse of his daughter. The Court stated:

"It is clear that the issue of defendant's alleged sexual abuse of his daughter was the factual focus of the jury trial in probate court. The transcript reveals that the testimony of the witnesses and the arguments of the parties centered on the allegation of sexual abuse that is also the basis of the criminal charge." (Op. p. 8 & 9)

In footnote 5 of the Court's opinion the Court summarized the facts:

"The child testified that defendant touched her 'hard' in the vaginal area, causing pain, once while she was sleeping in a living room chair, and that defendant told her not to tell her mother. She testified that defendant touched her 'about five [other] times.' Karen DuPage, a family therapist, testified that she interviewed the child

upon request of the Department of Social Services and that, in her opinion, the child had been molested by her father on a number of different occasions. Defendant took the stand and denied touching his daughter for any improper reason or abusing her in any way, although he admitted innocently touching her vaginal area at times when helping her use the bathroom or take a bath."

The Court stated that the question of sexual abuse was actually and fully litigated at the trial in Probate Court. (Op. p.9)

The Court nonetheless isolated a single paragraph from the instructions and concluded that the general verdict did not necessarily mean that the jury found that Nicole's home was unfit even if they found that Petitioner committed the acts set forth in the Petition, testified to and argued to the jury. The dissent by Justices Levin and Cavanaugh found this argument disingenuous.

The dissenters stated:

"We would hold that the entire record in the probate court proceeding -- the charge set forth in the petition, all the evidence, the arguments of counsel, and the instructions read

as a whole -- should be assessed in deciding whether the verdict of no jurisdiction constituted a determination by the jury that Gates had not sexually abused his daughter. That decision cannot properly be premised on a construction of a single sentence in the instructions viewed in the abstract, separate and apart from the entire record." (dissent p. 2)

The dissenters went on to state:

"There was, however, no evidence or argument -- separate and apart from the evidence tending to show that Gates had committed the act of sexual abuse and the evidence to the contrary -- focusing on or tending to show whether the home or environment was or was not fit. Thus, assuming arguendo that the jury understood that it was authorized to find the child's home fit although it found that her father had sexually abused her, there is no reason to suppose that the jury in fact could find that Gates had sexually abused his daughter but nevertheless found that her home was fit.

The amended petition filed in the probate court alleged that Gates had

touched his daughter's genitals for the purpose of sexual arousal or gratification. All the evidence introduced by both parties was directed to the primary allegation in the petition: that Gates had touched his daughter's genitals. Neither Gates nor his lawyer contended, expressly or by innuendo, during the examination of witnesses or during oral argument, that even if the jury found that Gates had so touched his daughter's genitals for the purpose of sexual arousal or gratification, her home was nevertheless a fit place for her to live.

A different question would be presented if three issues had been litigated: whether the child had been so touched, whether Gates had so touched her, and, if so, whether her home was nevertheless a fit place for her to live. Because no evidence was introduced focusing on whether the home was fit, even were the jury to find that the criminal conduct alleged in fact occurred, the majority's assertion that factors other than Gates' guilt or innocence may have been the basis of the "no jurisdiction" verdict is tenuous at best." (id pp. 5 & 6, foot-

notes omitted)

REASON FOR GRANTING CERTIORARI

This Court should grant certiorari for the following reasons:

1. To reverse the lower court's erroneous application of the federal rule of collateral estoppel.

2. To resolve a split in the application of this doctrine by the states. Michigan and Kentucky (Gregory v Commonwealth, 610 S.W.2d. 598 (Ky. 1980)) do not apply the doctrine. Maryland (Bowling v State, 298 Md 396 [1984]) and California (People v Sims, 32 Cal 3d 468; 186 Cal Rptr 77; 651 P.2d 321 [1982]) do apply the doctrine.

ISSUE I

WHETHER THE FEDERAL RULE OF COLLATERAL ESTOPPEL PRECLUDES A CRIMINAL TRIAL OF AN INDIVIDUAL CHARGED WITH SEXUAL ABUSE WHERE THE ISSUE OF SEXUAL ABUSE WAS FULLY LITIGATED BETWEEN THE SAME PARTIES IN THE JUVENILE DIVISION OF PROBATE COURT AND THE JURY RETURNED A GENERAL VERDICT IN FAVOR OF THE DEFENDANT IN THE JUVENILE COURT

In Ashe v Swenson, 397 U.S. 436; 90 S.Ct. 1189; 25 L.Ed.2d 469 (1970) this Court stated:

"'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *id* at 443

See also Section 68 of the Restatement of the Law of the Judgment. (p.293)

The doctrine is applicable when evoked in a criminal proceeding where the prior pro-

ceeding was civil in nature. Yates v U.S., 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). In Yates, supra, one of the defendants argued that the ruling in a prior denaturalization hearing precluded his prosecution on charges of violating the Smith Act. The Court rejected the argument finding that the ruling of the Court in the denaturalization hearing was limited only to the time of that hearing 1927 and did not apply to the time of the indictment. Even though the Court ruled against the defendant, the Court agreed that collateral estoppel applied even though the prior proceeding was civil in nature. The Court stated:

"We are in agreement with petitioner that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character. U.S. v Oppenheimer, 242 U.S. 85. We agree further that the nonexistence of a fact may be established by a judgment no less than its existence; that, in other words, a party may be precluded under the doctrine of collateral estoppel from attempting a second time to prove a fact that he sought unsuccessfully to prove in a prior action. Sealfon v

U.S., 332 U.S. 575. Nor need we quarrel with petitioner's premise that the standard of proof applicable in denaturalization cases is at least no greater than that applicable in criminal proceedings. Compare Helvering v Mitchell, 303 U.S. 391; Murphy v U.S., 272 U.S. 630. We assume, without deciding, that substantially the same standards of proof are applicable in the two types of cases. Cf. Klapprott v U.S., 335 U.S. 601, 612. Nevertheless, for reasons that will appear, we think that the doctrine of collateral estoppel does not help petitioner here.

We differ with petitioner, first of all, in his estimate of what the Schneiderman case determined for purposes of the doctrine of collateral estoppel. That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision, Commissioner v Sunnen, 333 U.S. 591, 601-602; Tait v Western Maryland R.Co., 289 U.S. 620; The Evergreens v Nunan, 141 F.2d 927, 928." 354 U.S. at 297-98.

The doctrine of collateral estoppel is

a fundamental concept of due process embodied in the Fifth Amendment to the United States Constitution, Ashe, supra, and is made applicable to the States, Benton v Maryland, 395 U.S. 784; 89 S.Ct. 2056; 23 L.Ed.2d 707 (1969).

In Ashe, supra, the Court gave guidance as to how the doctrine of collateral estoppel is to be applied where the previous verdict is a general verdict returned by a jury. The Court stated:

"Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Sealfon v U.S., 332 U.S. 575, 579, 92 L.Ed. 180, 184, 68 S.Ct. 237. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in

criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."

The Michigan Supreme Court did not apply this rule in the present case. An examination of the record in the present case shows and the Michigan Supreme Court found:

a) That the parties to both proceedings are the same (Op.7)

b) That the question of whether Petitioner sexually abused his daughter was actually and fully litigated by the parties. (Op.p9) On this point the Court stated:

"It is clear that the issue of defendant's alleged sexual abuse of his daughter was the factual focus of the jury trial in probate court. The transcript reveals that the testimony of the witnesses and the arguments of the parties centered on the allegation of sexual abuse that is also the basis of the criminal charge. At least in this sense, it can be said that the issue whether the defendant sexually abused the child was actually litigated." (Op p. 8 & 9)

In a footnote the Court summarized the trial facts as:

"The child testified that defendant touched her "hard" in the vaginal area, causing pain, once while she was sleeping in a living room chair, and that defendant told her not to tell her mother. She testified that defendant touched her "about five [other] times." Karen DuPage, a family therapist, testified that she interviewed the child upon request of the Department of Social Services and that, in her opinion, the child had been molested by her father on a number of different occasions. Defendant took the stand and denied touching his daughter for any improper reason or abusing her in any way, although he admitted innocently touching her vaginal area at times when helping her use the bathroom or take a bath." (op. p. 4., par. 5)

A review of the trial documents show :

a) That the Petitioner alleged sexual abuse as defined by the criminal statute.

b) That the prosecutor argued that the Defendant sexually abused his daughter. (PATr. pp 17-18)

c) That the jury was specifically instructed that the prosecutor's theory was that Petitioner sexually abused his daughter "for sexual gratification or arousal."

(PATr. p442)

d) That the jury was instructed that a child comes within the jurisdiction of the Court if the child's home is unfit due to the criminality of a parent. (PATr. pp 430-431)

In Ashe, supra, the Court in applying the articulated test stated:

"Straightforward application of the federal rule to the present case can lead to but one conclusion. For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible." 397 U.S. at 445.

In the present case the only issue before the jury was whether Petitioner sexually abused his daughter. The jury found that he had not. The federal doctrine of collateral estoppel bars Petitioner's prosecution on the

criminal charges and the Michigan Supreme Court's opinion is wrong.

The Michigan Supreme Court's conclusion that the jury's verdict did not "necessarily determine" whether Petitioner sexually abused his daughter is erroneous. In footnote 9 of this Court's opinion in Ashe, supra, the Court stated:

"If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction." Mayers & Yarborough, supra, at 38. See generally Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L Rev 317. See also Comment, Twice in Jeopardy, 75 Yale LJ 262; Hunvald, Criminal Law in Missouri, 25 Mo L Rev 369, 369-375; Comment, Double Jeopardy and Collateral Estoppel in Crimes Arising From the Same Trans-

action, 24 Mo L Rev 513; McLaren, The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases, 10 Wash L Rev 198." id 397 at 444.

The analysis of the Michigan Supreme Court is the analysis condemned in the footnote. The dissenters recognized this fact, and commented:

"There was, however, no evidence or argument -- separate and apart from the evidence tending to show that Gates had committed the act of sexual abuse and the evidence to the contrary -- focusing on or tending to show whether the home or environment was or was not fit. Thus, assuming arguendo that the jury understood that it was authorized to find the child's home fit although it found that her father had sexually abused her.

. . . .

"A different question would be presented if three issues had been litigated: whether the child had been so touched, whether Gates had so touched her, and, if so, whether her home was nevertheless a fit place for her to live. Because no evidence was intro-

duced focusing on whether the home was fit, even were the jury to find that the criminal conduct alleged in fact occurred, the majority's assertion that factors other than Gates' guilt or innocence may have been the basis of the "no jurisdiction" verdict is tenuous at best." (dissenting opinion p. 4 & 6)

The majority opinion of the Michigan Supreme Court is a completely erroneous application of the doctrine of collateral estoppel and of the analysis set forth in Ashe v Swenson, 397 U.S. 436; 90 S.Ct. 1189; 25 L.Ed.2d. 469 (1970). The opinion should be reversed.

CONCLUSION

For the reasons stated herein, the Petition for Certiorari should be granted.

DATED: April 6, 1990

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A P P E N D I C E S

APPENDIX A

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

v

No. 83363

GREGORY STEVEN GATES,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH:

GRIFFIN, J.

In view of a jury verdict of "no jurisdiction" in a child-protective probate proceeding, we are asked to determine whether the doctrine of collateral estoppel bars subsequent prosecution of the defendant for criminal sexual conduct where the factual allegations against the defendant in both proceedings are essentially the same. Because the prior probate court verdict did not necessarily determine the guilt or innocence of the defendant, we hold that the principles of collateral estoppel do not apply.

I

In February, 1986, the Michigan Department of Social Services petitioned the juvenile division of the Jackson County Probate Court to take jurisdiction of a child, then three years and ten months old, on the basis of allegations that defendant, her father,

has sexually abused her.¹ The petition in-

¹ The initial petition read:

"On or about 02-13-86, [the child] was interviewed by petitioner. During this interview, [she] stated that her father had touched her 'pee real hard.' While stating this, [she] showed petitioner what she meant by placing both of her hands on her vaginal area. [She] further illustrated this while using the sexually explicit dolls by placing the adult male doll's hand on her ... vaginal area. [She] stated that when this occurred she had no clothes on.

"[She] further revealed that she had not told her mother of her father's actions because she was afraid of what her father would do."

After the petition was filed, the DSS was represented by the Ingham County Prosecutor, who was allowed to amend the petition to add:

"It is also alleged that: This touching by the father could reasonably be construed as being for purposes of sexual arousal or gratification."

The petition referred to MCL 712A.2; MSA 27.3178 (598.2). As amended, the allegations fell within the scope of MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2), which at the time provided:

"Except as otherwise provided herein, the juvenile division of the probate court shall have:

* * *

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

* * *

"(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian, or other custodian, is an unfit place for such child to live in."

initiated child-protective proceedings, the adjudicative phase of which leads to a determination of whether statutory grounds exist for juvenile court jurisdiction.² If such grounds are found to exist and the court assumes jurisdiction, dispositional proceedings are conducted thereafter to determine what action, if any, should be taken with respect to the child. MCR 5.961 et seq.

At the time the petition was filed in probate court, the defendant-father had been divorced from the child's mother for a period of two months. Although the child lived with her mother, defendant had been awarded joint custody of the child from the date of the couple's legal separation in February, 1985, and prior to the filing of the petition, he had physical custody of the child every weekend. However, following the filing of the petition, unsupervised visitations by the child in the home of her father were suspended.

Defendant contested the petition and requested a jury trial.³ After the petition

² The statutory grounds for juvenile court jurisdiction are found in MCL 712A.2; MSA 27.3178(598.2).

³ See MCL 712A.17; MSA 27.3178(598.17); also MCR 5.971(B). The child's mother did not oppose the petition.

was filed, but prior to the jury trial held in probate court, the prosecuting attorney, who represented the DSS in the probate proceeding, filed a criminal complaint and warrant in the Jackson Circuit Court, charging defendant with second-degree criminal sexual conduct, on the basis of the same facts alleged in the probate court petition.⁴

In the probate court trial which took place on June 16 and 17, 1986, the testimony dealt almost exclusively with the allegations of sexual abuse.⁵ At the close of the trial,

⁴ The criminal complaint alleged that defendant had violated MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), which provides:

"(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

"(a) That other person is under 13 years of age."

As defined by MCL 750.520a(k); MSA 28.788(1)(k), "sexual contact" includes "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification."

⁵ The child testified that defendant touched her "hard" in the vaginal area, causing pain, once while she was sleeping in a living room chair, and that

(continued...)

the probate court instructed the jury that the issue it was to decide was whether the child came within the jurisdiction of the court. The jury was further instructed that a child comes within the jurisdiction of the court if the child's home or environment is unfit for the child by reason of neglect, cruelty, criminality, or depravity on the part of a parent.

The jury was given a verdict form which allowed it to check off one of two verdicts: jurisdiction, or no jurisdiction. The jury returned a verdict of "no jurisdiction."

The judge then asked the jury, "Do you say upon your oath that you find the minor ... is not a neglected minor in the manner and form as the People have in their information in this cause charged?" Each of the jury members responded affirmatively.

⁵ (...continued)

defendant told her not tell her mother. She testified that defendant had touched her "about five [other] times." Karen DuPage, a family therapist, testified that she interviewed the child upon request of the Department of Social Services and that, in her opinion, the child had been molested by her father on a number of different occasions. Defendant took the stand and denied touching his daughter for any improper reason or abusing her in any way, although he admitted innocently touching her vaginal area at times when helping her use the bathroom or take a bath.

On July 28, 1986, the probate judge granted a motion for judgment notwithstanding the verdict, and then ordered a new trial. However, the Jackson Circuit Court subsequently reversed, reasoning that the jury verdict deprived the probate judge of jurisdiction to grant such relief.

Thereafter, the Jackson Circuit Court dismissed the criminal charges against defendant on the ground that the jury verdict in probate court determined "that the prosecution had not proved a case of sexual abuse by a preponderance of the evidence." The Court of Appeals affirmed. 168 Mich App 384; 423 NW2d 668 (1988). We then granted leave to appeal, limited to the issue whether, in view of the prior proceedings in probate court, principles of collateral estoppel prohibited the subsequent prosecution of defendant.⁶ 431 Mich 904 (1988).

II

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a

⁶ In this appeal we are not required to consider whether defendant's prosecution is barred by the Double Jeopardy Clause of the United States Constitution. US Const, Ams V, XIV.

valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined.⁷ Jacobson v Miller, 41 Mich 90, 93; 1 NW 1013 (1879); Howell v Vito's Trucking & Excavating Co, 386 Mich 37, 42; 191 NW2d 313 (1971); Restatement Judgments, Section 68, p 293. 1 Restatement Judgments, 2d, Section 27, p 250.⁸

We believe it is important at the outset to recognize that in the body of case law applying this principle the vast majority of cases involve the applicability of collateral estoppel where there are two civil proceedings. Cases involving "cross-over estoppel," where an issue adjudicated in a civil proceeding is claimed to be precluded in a subsequent criminal proceeding, or vice versa

⁷ We use the term "collateral estoppel" to refer to issue preclusion. This Court generally uses the term "res judicata" to refer to what is often called "claims preclusion," which covers the preclusive effect of a judgment upon a subsequent proceeding on the basis of the same cause of action. Jones v Chambers, 353 Mich 674; 91 NW2d 889 (1958).

⁸ The Second Restatement is limited to the effect of prior adjudications in civil litigation, and does not deal with the effect of a prior civil judgment in a subsequent criminal prosecution. The ensuing citations to the Second Restatement are made with this observation in mind.

are relatively recent and rare.⁹

A

There is no set formula for determining whether relitigation of an issue is precluded by collateral estoppel. Initially it is necessary, according to the First Restatement of Judgments, to establish that the same parties are involved in both proceedings.¹⁰ This Court last affirmed the "same party" requirement in Howell, supra, at 42, wherein we said that one of the "critical factors" in applying collateral estoppel is the determination of whether the respective litigants were parties or privy to a party to an action in which a valid judgment has been rendered.

⁹ We borrow the efficient term "cross-over estoppel" from Brenner, "Crossing-over" The issue-preclusive effects of a civil/criminal adjudication upon a proceeding of the opposite character, 7 N Ill L R 141 (1987), in which the phenomenon is reviewed and analyzed.

¹⁰ "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves." Restatement Judgments, Section 82, pp 384-385. "A person who is not a party but who is in privity with the parties...is...bound by and entitled to the benefits of the rules of res judicata." Restatement Judgments, Section 83, p 389.

Although the named-party plaintiff in the instant case is the People of the State of Michigan, in practical terms the party against whom collateral estoppel is asserted is the Jackson County Prosecutor, who also represented Department of Social Services in the probate court proceeding. Defendant argues that even though the Department of Social Services was the nominal party in the earlier proceeding, both the department and the prosecutor's office are creatures of the state and thus should be considered to be the same party.¹¹ We agree. A functional analysis of the role of the prosecutor in both proceedings is appropriate in this case, and leads us to conclude that privity is sufficient to satisfy the "same party" requirement.¹²

¹¹ This is the conclusion reached by the Court of Appeals in People v Watt, 115 Mich App 172, 175; 320 NW2d 333 (1982); lv den 413 Mich 926 (1982). The Court of Appeals in the instant case found Watt to be dispositive. 168 Mich App 384, 388; 423 NW2d 668 (1988).

¹² One commentator has observed that "[i]n recent decades, there seems to have developed a nearly universal agreement among judges and scholarly commentators alike that res judicata cannot be soundly administered by means of resolute adherence to a battery of self-enclosed rules ... as constituting the sole and sufficient grounds of decisions in cases involving the preclusive effect of judgments." Instead, collateral
(continued...)

In analyzing whether an issue was "actually litigated" in the prior proceeding, the Court must look at more than what has been pled and argued. We must also consider whether the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue. Blonder-Tongue Laboratories, Inc v Univ of Ill Foundation, 402 US 313, 329; 91 S Ct 1434; 28 L Ed 2d 788 (1971).

It is clear that the issue of defendant's alleged sexual abuse of his daughter was the factual focus of the jury trial in the probate court. The transcript reveals that the testimony of witnesses and the arguments of the parties centered on the allegation of sexual abuse that is also the basis of the criminal charge. At least in this sense, it can be said that the issue whether defendant sexually abused the child was "actually litigated."

We do not overlook that the rules governing child-protective proceedings in probate

12

(...continued)

estoppel determinations increasingly are the product of "multifaceted analysis and balancing of competing and vaguely defined governmental and private interests..." Holland, Modernizing res judicata: Reflections on the Parklane Doctrine, 55 Ind L J 615, 618-619 (1980).

court are significantly different than the rules which apply to criminal trials.¹³ As we will later discuss, such procedural differences raise serious doubts about the soundness of applying "cross-over estoppel" in situations such as this case presents. However, we do not base our decision on a finding that the prosecutor was seriously disadvantaged or otherwise denied a full and fair opportunity to litigate the issue of defendant's alleged criminal conduct. Indeed, in its brief the amicus curiae Prosecuting Attorneys Association stated that it is "fair to say that the issue was fully litigated."

We move now to a discussion of the principal ground on which our decision rests.

B

Assuming arguendo that the issue as to which collateral estoppel is asserted has been fully litigated, we conclude that the instant case falls short with respect to another requirement, i.e., that the issue be

¹³ For example, see MCR 5.972(C)(1) (the burden of proof in a probate proceeding is a preponderance of the evidence); MCR 5.965(B)(6) (a referee, rather than a judge, may preside at the trial); MCR 5.972(C)(2) (statements by a child which do not fall within an exception to the hearsay rule are admissible under certain circumstances). See also n 20.

"necessarily determined" by the judgment in the prior proceeding. An issue is necessarily determined only if it is "essential" to the judgment. 1 Restatement Judgments, 2d, Section 27, p 250, comment h, p 258. In order for collateral estoppel to operate as a bar to a subsequent prosecution, the jury in the earlier probate proceeding just necessarily have determined that defendant was not guilty of the criminal sexual conduct charged in the prosecutor's complaint. MacKenzie v Union Guardian Trust Co, 262 Mich 563, 581-582; 247 NW 914 (1933).

The inability of a court to determine upon what basis an acquitting jury reached its verdict, is, by itself, enough to preclude the defense of collateral estoppel. See anno: Modern status of doctrine of res judicata in criminal cases, 9 ALR 3d, 203, 240. Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally. See Sealfon v United States, 332 US 575; 68 S Ct 237; 92 L Ed 180 (1948).

The verdict in the first proceeding need not explicitly have addressed the issue to be precluded, however. The fact that a verdict is a general verdict may make the determination of what issues have been decided problematic, but it does not automatically bar the

application of collateral estoppel. Ashe v Swenson, 397 US 436, 444; 90 S Ct 1189; 25 L Ed 2d 469 (1970). In Ashe, the United States Supreme Court suggested that in the case of a general verdict of acquittal in a criminal trial the determination of what was necessarily determined by the verdict should start with an examination of the record of the prior proceeding and culminate in an inquiry "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id.¹⁴

That a verdict may conclusively determine certain issues by implication can be illustrated by the instant case. Had the jury in the earlier proceeding found that the probate court had jurisdiction of the child, that verdict would necessarily have determined that defendant had engaged in the conduct alleged, because that conduct was the only basis submitted to the jury for bringing her within the jurisdiction of the court. A finding that the petition's allegations were proved by a preponderance of the evidence was thus essential to a verdict of jurisdic-

¹⁴ Of course, the heightened burden of proof in a criminal trial would prevent the prosecutor from asserting collateral estoppel against a defendant in the criminal trial.

tion.

The verdict of "no jurisdiction," however, does not support the opposite conclusion. In the instant case, the probate judge stated to the jury:

"I do instruct you that this is a child protection case. It is not a criminal case. Therefore, the issue before you is not that of guilt or innocence but the issue is whether [the child] comes within the jurisdiction of the Juvenile Division of the Jackson County Probate Court. You should not consider this proceeding in anyway [sic] involved with the criminal law so far as your deliberations are concerned."

The clear import of that instruction is that even if the jury believed that a criminal violation had occurred, it was not required to find the child's home or environment to be unfit so as to warrant jurisdiction.¹⁵ In

¹⁵ The standard jury instructions approved by the Probate Judges Association of Michigan make this point even more emphatically:

Instruction 25

"The legal definition of criminality is the same as the common understanding of the word criminality. Criminality is present when a person violates the criminal law of the State of Michigan or of the United
(continued...)"

short, a finding of innocence was not essential to a verdict of no jurisdiction; thus, the verdict did not "necessarily determine" the issue of criminal guilt or innocence.¹⁵

Furthermore, during the course of the trial the jury learned that the child's mother had exclusive physical custody of the child and that visitations with her father had ceased. The jury might have concluded on that basis alone that the child did not require the protection of the probate court. Thus the jury's verdict could rationally have been based on grounds other than a determination of defendant's innocence of the allega-

¹⁵ (...continued)

States. Whether a parent's violation of the criminal laws of the criminal laws of the State of Michigan or of the United States renders the home or environment of the child an unfit place for the child to live in is for you to decide based on [sic] all the evidence in the case." Owens, Juvenile jury instructions, Inter-com 21, 33 (April, 1989). (Emphasis added.)

¹⁶ We are aware of the dangers of a "hypertechnical" analysis of what has been necessarily determined by a judgment, a danger warned of by the United States Supreme Court in Ashe, supra at 444. In the instant case, our conclusion that the jury verdict did not determine the issue of criminal guilt or innocence is not based on the fact that the verdict did not address that issue, but on the fact the instruction to the jury made clear that a determination of criminal guilt or innocence was not essential to its verdict.

tions in the petition.¹⁷

III

Apart from our conclusions that defendant's guilt or innocence was not necessarily determined by the jury verdict in the probate proceeding, the purposes of a child-protective proceeding and a criminal proceeding are so fundamentally different that the application in this instance of collateral estoppel would be contrary to sound public policy.¹⁸

¹⁷ The Supreme Court of Kentucky applied similar reasoning in its rejection of collateral estoppel in Gregory v Kentucky, 610 SW2d 598 (Ky, 1980). Gregory had argued that an express finding in a prior dependency hearing that he had not sexually abused his sons estopped his subsequent prosecution for first-degree sodomy. Unlike the instant case, dependency was found in the first proceeding, on the basis of considerations other than the allegations of sexual abuse. The court rejected Gregory's claim of collateral estoppel because the criminality of Gregory's actions was not before the first court, which was charged generally with the well-being of the children, and because the first court's express findings on sexual abuse were not essential to its decision.

¹⁸ Such a public policy exception is recognized by the 1 Restatement Judgments, 2d, Section 28, p 273:

"Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties
(continued...)

The purpose and focus of a neglect or abuse proceeding in the juvenile division of the probate court is the protection of children. To this end, proceedings may be initiated by anyone who has information that a child is in need of the court's protection.¹⁹ To maximize protection of the child, and at the same time safeguard the interests of parents whose children are the subject of a petition, the court rules provide for expedited proceedings.²⁰ The probate court's protective function is also promoted by procedure which allows for a rehearing or a

¹⁸ (...continued)

is not precluded in the following circumstances:

"(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action."

See State v Fagan, 66 NY2d 815; 498 NYS2d 335; 489 NE2d 222 (1985), and State v Alvey, 678 P2d 5 (Hawaii, 1984), for recent applications of this exception.

¹⁹ MCL 712A.11(1); MSA 27.3178(598.11)(1)

²⁰ If a petition is filed and the child has been removed from the home, a preliminary hearing must take place within twenty-four hours. MCR 5.965(A). If the child remains outside the home, the trial must take place within forty-two days. If the child has not been taken into court custody, the deadline for trial is six months MCR 5.972(A).

new trial whenever new evidence comes to light suggesting that the child needs court protection. MCR 5.992.

In contrast, the focus of a criminal proceeding is on the guilt or innocence of the accused. The interests of children may be affected, e.g., those related to the accused, but such interests are not taken into account in determining whether an accused is guilty of criminal charges. As the United States Supreme Court stressed in Standefer v United States, 447 US 10, 25; 100 S Ct 1999; 64 L Ed 2d 689 (1980):

""[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant."" (quoting US v Standefer, 610 F2d 1076, 1093 [CA 3, 1979].) (Emphasis added).

The disparate purposes of the two types of proceedings argue strongly against the application of collateral estoppel. If we were to endorse the proposition that a determination of no jurisdiction in a child-protective proceeding operates to collaterally estop criminal charges, we would invite the risk

that the proper functions of the two proceedings would be compromised.

Typically, a child-protective proceeding is initiated by the petition of a person other than the prosecutor. Once the petition is filed, however, the prosecutor must be available at the request of the probate court to review the petition for legal sufficiency and to appear at the proceedings. MCR 5.914.

To avoid the effect of collateral estoppel, if it were to be made applicable, prosecutor would be required to develop criminal charges indicated by the petition and bring them to trial before a determination concerning jurisdiction could be reached in the probate proceeding. However, the burden of proving criminal charges beyond a reasonable doubt, added to problems presented by conflicting procedural²¹ and scheduling requirements of the two courts, would make it extremely difficult, and often impossible, for the criminal charges to be brought to trial in circuit court in advance of the jurisdiction determination in probate court.

Thus, the petitioner or the prosecutor would face an unfortunate choice that is not in the public interest: whether to proceed on the petition in probate court because of con-

²¹ See n 20.

cern for the child, or to delay the probate proceeding because of concern that a verdict of nonjurisdiction would preclude criminal prosecution of the accused.

We are persuaded by public policy considerations that such an election between criminal and child-protective proceedings should not be judicially imposed through the application of collateral estoppel. See Joiner v State, 500 So 2d 81 (Ala Crim App, 1986).²²

Our conclusion that collateral estoppel should not apply in such situations is reinforced by the Restatement of Judgments, 2d, which instructs that another exception to the general rule of issue preclusion is available when:

"A new determination of the issue is warranted by differences in the

²² At least one appellate decision in Michigan has relied upon a substantial difference in the purpose of the proceedings as a basis for denying collateral estoppel to issues common to both proceedings. Thangavelu v Dep't of Licensing & Regulation, 149 Mich App 546; 386 NW2d 584 (1986), lv den 425 Mich 864 (1986).

Other state courts have applied similar reasoning. In re Katherine & Kimberly B, 126 Misc 2d 1085; 484 NYS2d 788 (1985); Gregory v Commonwealth, n 17 supra at 600; People v Fagan, n 18 supra, and State v Alvey, n 18 supra. Cf. Lockwood v Superior Court, 160 Cal App 3d 667; 206 Cal Rptr 785 (1984).

quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them..." Id., Section 28(3), p 273.

This exception focuses on an "analysis of the comparative quality and extensiveness of the procedures followed in the two courts, of their relative competence to deal with the particular issue, and of the legislative purpose in allocating jurisdiction between them." Reporter's Note, 1 Restatement Judgments, 2d, Section 28, p 287.²³

Even if it were to be assumed that the "quality" and "extensiveness of the procedures followed in the two courts" (probate and circuit) are comparable, we believe that the "competence" of the probate court to conclusively determine in a child-protective proceeding the criminal guilt or innocence of an accused is necessarily compromised by the appropriate focus of the probate court on the protection of children. Further, the disparity of "legislative purpose in allocating

²³ A similar analysis was recently employed by this Court to reject the argument that an MESC adjudication denying unemployment benefits should operate to preclude litigation of issues in a subsequent suit for breach of an employment contract. Storey v Meijer, Inc., 431 Mich 368, 372-373; 429 NW2d 169 (1988).

jurisdiction" as between the two courts was underscored by the Legislature when it inserted this language in the statute under which the petition to protect the child was filed:

"Proceedings under this chapter shall not be considered to be criminal proceedings." MCL 712A.1; MCA 27.3178 (598.1).²⁴

IV

Because the issue of defendant's criminal guilt or innocence was not necessarily decided in the prior proceedings in the probate court, principles of collateral estoppel do not prohibit the prosecution of defendant.²⁵

²⁴ Prior to 1988 PA 224, the second quoted sentence provided, "Proceedings under this chapter shall not be deemed to be criminal proceedings."

²⁵ Plaintiff also argues that collateral estoppel should not preclude defendant's criminal prosecution because there is no mutuality of estoppel, citing Restatement Judgments, Section 80 et seq., and Howell, supra at 45-46. If the jury had found that the probate court did have jurisdiction over the child, defendant would not have been precluded from defending himself against the criminal charge. Cf. 1 Restatement Judgments, 2d, Sections 27-29, pp 250-303; 1B Moore, Federal Practice, Paragraph 0.441[3.-2], p 734, and Bernhard v Bank of America National Trust & Savings Ass'n, 19 Cal 2d 807; 122 P2d 892 (1942). Since we are not required by this case to do so, we choose not to revisit the mutuality rule in Howell at this time.

Accordingly, we reverse the decision of the Court of Appeals and vacate the order dismissing the criminal charges against defendant. We remand this case to the trial court for further proceedings in conformity with this opinion.

/s/ Robert P. Griffin
/s/ James H. Brickley
/s/ Patricia J. Boyle
/s/ Dennis W. Archer
/s/ Dorothy Comstock Riley

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

v

No. 83363

GREGORY STEVEN GATES,

Defendant-Appellee.

LEVIN, J. (dissenting).

The question presented is whether the Court of Appeals erred in concluding that this prosecution is barred by the doctrine of collateral estoppel. We would hold that it did not, and would affirm.

A probate court jury found that the court did not have "jurisdicción" of defendant Gregory Steven Gates' daughter. The majority concludes that the verdict of the probate court jury did not "determine"¹ that Gates had not committed the act of sexual abuse of his three-year old daughter charged

¹ The majority uses the phrase "necessarily determine." The Restatement uses the term "determine":

"When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." 1 Restatement Judgments, 2d, Section 27, p 250.

both in the information in the instant 'case and in the petition filed by the Department of Social Services in the earlier tried probate court proceeding. That conclusion is premised on the manner in which the jury was instructed.

We would hold that the entire record of the probate court proceeding - the charge set forth in the petition, all the evidence, the arguments of counsel, and the instructions read as a whole - should be assessed in deciding whether the verdict of no jurisdiction constituted a determination by the jury that Gates had not sexually abused his daughter. That decision cannot properly be premised on a construction of a single sentence in the instructions viewed in the abstract, separate and apart from the entire record.

I

The judge instructed the jury, in the form of the statute² and the standard instructions developed by probate judges,³ that the jury must find, from all the evidence, whether the child's home or environment, by reason of criminality, was an unfit place for her to live. The question so posed, viewed

² See n 3.

³ See text accompanying n 5.

in the abstract, did indeed permit the jury to find that the criminal conduct charged did not render her home unfit. It is possible that the jury understood the instructions as authorizing it to render a verdict that the home was fit although it was convinced that Gates had in fact sexually abused his daughter. And that the jury found that Gates had in fact sexually abused his daughter but nevertheless found that her home was fit. Possible, but not likely.

A

The language of the statute⁴ and the phrasing of the instructions reflect recognition that some acts of criminal misconduct might not render a home unfit for a child. A parent who circulates counterfeit money, embezzles, pollutes the environment, or commits other crimes that some might view as

⁴ "Except as otherwise provided herein, the juvenile division of the probate court shall have:

* * *

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

* * *

"(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian, or other custodian, is an unfit place for the child to live in." MCL 712A.2; MSA 27.3178(598.2).

more or less serious, may nevertheless provide a fit home for his children. The statute does not permit the probate court to assume jurisdiction unless the jury finds that the criminal act renders the home unfit.

The jury was thus properly instructed that "[w]hether a parent's violation of the criminal law renders the home or environment of the child an unfit place for the child is for you to decide based upon all of the evidence in the case." (Emphasis supplied.)⁵

⁵ The majority emphasizes the following instruction:

"I do instruct you that this is a child protection case. It is not a criminal case. Therefore, the issue before you is not that of guilt or innocence but the issue is whether [the child] comes within the jurisdiction of the Juvenile Division of the Jackson County Probate Court. You should not consider this proceeding in anyway [sic] involved with the criminal law so far as your deliberations are concerned."

That instruction seems to have echoed the penultimate paragraph of the prosecutor's closing argument:

"You know, at the very minimum, this is certainly a case that the People believe by at least a preponderance of the evidence, shows to you that this child comes within the jurisdiction of the court and that's what we're asking. It's not a criminal case. This case is not a criminal case. The father cannot go to jail as a result of the proceedings today here, and we would ask you to find that the minor... comes within the jurisdiction of the court so the court can keep an
(continued...)

There was, however, no evidence or argument-separate and apart from the evidence tending to show that Gates had committed the act of sexual abuse and the evidence to the contrary-focusing on or tending to show whether the home or environment was or was not fit. Thus, assuming arguendo that the jury understood that it was authorized to find the child's home fit although it found that her father had sexually abused her, there is no reason to suppose that the jury in fact found that Gates had sexually abused his daughter but nevertheless found that her home was fit.

The amended petition filed in the probate court alleged that Gates had touched his daughter's genitals for the purpose of

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(...continued)

eye on the her and the court can keep an eye on the father...."

The defendant then objected, and the court said that it would give an instruction concerning what the court does "as a result of your making a finding" and asked the prosecutor whether that would be sufficient, and the prosecutor said that it was.

sexual arousal or gratification.⁶ All the evidence introduced by both parties was directed to the primary allegation in the petition: that Gates had touched his daughter's genitals.⁷ Neither Gates nor his lawyer contended, expressly or by innuendo, during the examination of witnesses or during oral argument, that even if the jury found

⁶ The original petition filed by the DSS was amended by the prosecutor when he entered the case. The amendment added the words, "for purposes of sexual arousal or gratification." The additional language mirrors the penal code definition of sexual contact: "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim or the victim's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.529a; MSA 28.788(1)(k).

⁷ In response to a question from one of the justices during oral argument in this Court, the prosecutor acknowledged that he had not alleged any other conditions that would have rendered the home unfit when he filed the proceeding.

During the trial, the prosecution did not go beyond the scope of the petition's allegations either during the presentation of the case in chief or during the cross-examination of defense witnesses. Nor did Gates introduce or explore any other issues during his case in chief or on cross-examination of the people's witnesses.

that Gates had so touched his daughter's genitals for the purpose of sexual arousal or gratification, her home was nevertheless a fit place for her to live.

A different question would be presented if three issues had been litigated: whether the child had been so touched, whether Gates had so touched her, and, if so, whether her home was nevertheless a fit place for her to live. Because no evidence was introduced focusing on whether the home was fit, even were the jury to find that the criminal conduct alleged in fact occurred, the majority's assertion that factors other than Gates' guilt or innocence may have been the basis of the "no jurisdiction" verdict is tenuous at best.⁸

⁸ The majority asserts that because the jury learned that the mother had exclusive custody of the child,

"[t]he jury might have concluded on that basis alone that [the child] did not require the protection of the probate court. Thus the jury's verdict could rationally have been based on grounds other than a determination of the defendant's innocence of the allegations in the petition." Slip op, 12-13.

Gates' lawyer did not ask the jury to consider that the mother had exclusive custody of the child or Gates' limited access to her in deciding whether the probate court had jurisdiction of her.

II

The Maryland Court of Appeals held that "the doctrine of collateral estoppel prevents the State from criminally trying the defendant on charges of sexual assault and related offenses when, in a prior civil proceeding based upon the same alleged incidents, the court dismissed the action on the ground that the State had failed to prove that the defendant had committed the acts." Bowling v State, 298 Md 396, 398; 470 A2d 797 (1984).⁹ The court said that "[t]he civil character of the first proceeding does not make inapplicable the doctrine of collateral estoppel in a subsequent criminal case."¹⁰

⁹ In Bowling, a father was charged with sexually assaulting his adopted daughter. A child-in-need-of-assistance petition was filed in circuit court. The petition was based on allegations of sexual abuse. A hearing was held to determine whether the daughter was a child in need of assistance. "The testimony at the hearing dealt almost exclusively with whether or not the alleged incidents of sexual misconduct actually occurred." Id., p 399. The trial judge found that sexual abuse had not been proven by a preponderance of the evidence. Id. The court dismissed the petition. Subsequently a criminal indictment was filed against the father. "The indictment was grounded on the identical factual allegations which formed the basis for the earlier" petition. Id., p 400.

¹⁰ Id., p 404

In People v Sims, 32 Cal 3d 468; 186 Cal Rptr 77; 651 P2d 321 (1982), the Supreme Court of California applied the doctrine of collateral estoppel in a criminal case that was preceded by an administrative hearing.¹¹ The court said:

¹¹ Sims, a welfare recipient, was notified by the Social Services Department of Sonoma County that she had received AFDC and food stamp benefits to which she was not entitled. The county claimed that she "had failed to report that the children's stepfather... was fully employed and living at home while respondent received public assistance...." Id., p 473.

The county then prepared a "Notice of Action" against Sims. "The notice proposed to reduce future cash grants to respondent to compensate for the alleged overpayments." Id. Sims filed a request for a "fair hearing" pursuant to a California statute "to challenge the propriety of the County's action." Id. Prior to Sims' request for a fair hearing, "a criminal complaint had been filed against her in municipal court. The complaint was based on the same allegations of fraud that were the subject of the County's 'Notice of Action'" Id.

While the criminal prosecution was pending, Sims' fair hearing was held. The hearing officer found that "the County failed to meet its burden of proving that respondent had fraudulently obtained welfare benefits." Sims later moved to dismiss the criminal charges pending against her. The trial court granted her motion. Id., p 474.

The county had declined to present evidence against Sims at the hearing. It contended that the DSS lacked jurisdiction to hear the case since criminal charges were pending in the municipal court.

"[C]ollateral estoppel may be applied to decision made by administrative agencies '[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate...'"¹²

The court added that "[t]he [administrative agency] decision exonerating [the accused] of fraud may be given collateral estoppel effect. This is true even where, as in this case, the successive proceedings involved are different in nature and the proceeding to be estopped is a criminal prosecution..."¹³

¹² Id.; p 479.

Similarly, see People v Watt, 115 Mich App 172, 182; 320 NW2d 333 (1982), where the Court of Appeals applied the doctrine of collateral estoppel to bar a criminal prosecution and said:

"Since the very essence of the criminal proceeding was based upon the allegation that defendant fraudulently misrepresented to the DSS regarding whether or not her ex-husband resided with her in her home, and since, in an appropriate proceeding, the administrative law judge held that the DSS had not established that fact...we believe that the criminal conviction must here be reversed and the criminal proceedings dismissed."

¹³ Id., p 482.

Bowling and Sims are, however, distinguishable because in both cases the trial court in the civil proceeding specifically found that the criminal misconduct charged in the criminal prosecution had not occurred while here there was not such a specific finding.

III

Whenever there is a general verdict - most jury verdicts are general verdicts - there will be difficulty deciding what the jury determined regarding the underlying disputed issues of fact requisite to the ultimate finding. In deciding whether an issue of fact was actually litigated and determined, a court should assess the entire record and decide the question based on the probabilities and not possibilities.

That was the approach of the United States Supreme Court in Ashe v Swenson, 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970). The Court said that "[w]here a previous judgment of acquittal was based upon a general verdict" in deciding whether relitigation is barred by the doctrine of collateral estoppel, a court should

"examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other

relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."¹⁴

The majority cites Ashe with apparent approval, but does not in its analysis employ the standard there stated.¹⁵

The trial centered on Gates' culpability. In his closing remarks to the jury, the judge said: "When you deliberate, you are only allowed to consider the evidence which has been properly admitted in this case." The only "evidence" that had been admitted was testimony concerning whether the child had been molested and, if so, whether Gates was the person who had molested her. No evidence otherwise bearing on the fitness of her home had been introduced.

Where the trier of fact/court renders alternative determinations of fact or law either of which would have supported the earlier judgment, neither determination is "essential to the judgment."¹⁶ Where, how-

¹⁴ Id., p 444

¹⁵ Slip op, p 10.

¹⁶ 1 Restatement Judgments, 2d, Section 27, comment h, p 258.

See n 1 for Section 27 of the Restatement Judgments, 2d.

ever, only one issue is litigated,¹⁷ only one issue could have been determined, and ordinarily there is no reason to suppose that another issue, not litigated, was determined or was determinative.

The parties frame the debate on a given issue through their presentations. They define the parameters in which the jury will consider the competing evidence and arguments. When the parties to a controversy plead, litigate, and submit an issue to the jury, a general verdict should ordinarily be regarded as deciding that issue. There should be a strong presumption that the decision of the jury is based on the issue pled, litigated, and submitted, rebuttable only by compelling evidence that the verdict did not decide that issue.

Here the only issue that was litigated was whether Gates had sexually abused his daughter. The overwhelming probability is that the factual issue determined by the jury, when it rendered its verdict, was whether Gates had sexually abused his daughter, as the people so vigorously, but so far unsuccessfully, contended.

¹⁷ The majority concedes that the question of Gates' guilt or innocence was the factual focus of the probate proceeding such that it was "actually litigated." Slip op, p 8.

There is considerable uncertainty in most lawsuits. The law does not require absolute proof of certainty. The standard applied by the majority in the instant case, in deciding whether the factual issue of Gates' culpability was determined by the jury, is higher than the standard the jury, on the retrial ordered by the majority, will apply in again deciding that factual issue.

There is considerable uncertainty in most lawsuits. The law does not require absolute proof of certainty. The standard applied by the majority in the instant case, in deciding whether the factual issue of Gates' culpability was determined by the jury, is higher than the standard the jury, on the retrial ordered by the majority, will apply in again deciding that factual issue.

The doctrine of collateral estoppel evolved in response to "the concern of the public in the settlement of litigation in the interests of a stable society and in minimizing expense and effort of the courts, as well as of the litigants."¹⁸ Application of the doctrine in a case where a person's liberty interests are at stake provides assurance that

¹⁸ Polasky, Collateral estoppel-Effects of prior litigation, 39 Iowa L R 217, 219 (1954).

"matters once determined in an adversary action shall be deemed conclusive, thus furnishing a basis upon which to predicate future conduct without fear of repeated vexation arising from relitigation of determined issues."¹⁹

The people failed to convince the jury of Gates' guilt. He should not be subjected to relitigation of the same basic issue - whether he sexually molested his daughter - in a criminal prosecution.

IV

The majority states that the purposes of a child-protective proceeding and a criminal prosecution are so different that application of the doctrine of collateral estoppel would be contrary to sound public policy.²⁰ Although the general purposes of the two proceedings differ, there is an overlap, and the purposes are not mutually exclusive.

The instant case demonstrates that a function of the probate court proceeding may in fact be to determine whether a parent engaged in criminal misconduct with respect to the parent's child. Where the probate court petition is based solely on an allegation of

¹⁹ Id., pp 219-220.

²⁰ Slip op, p 13.

parental criminal misconduct with respect to the child, the fate of both the child and the parent are inextricably tied to the determination of the parent's guilt or innocence. The probate court cannot act to "protect" the child by acquiring jurisdiction of the child, unless the jury finds that the parent is guilty of the criminal misconduct respecting the child charged in the petition. Where sexual abuse is charged, the purpose sought to be achieved by initiating the abuse/neglect proceeding can only be realized upon a finding by the jury that the parent did in fact commit the charged act of criminal misconduct respecting the child.

In an abuse/neglect proceeding, various considerations may inform the jury's verdict. The application of the doctrine of collateral estoppel in a particular case does not, however, depend on what may occur in another case. It depends on what occurred in the particular case. In the instant case - typical or atypical - the only issue pled, litigated, and submitted to the trier of fact was Gates' guilty or innocence. No evidence bearing on any other issue was provided for the jury's consideration. Collateral estoppel effect should not be denied where there is issue identity, where only one issue was pled, litigated, and submitted to the jury,

because in another case more than one issue might be litigated or because there is in theory a difference in the primary purpose of the two proceedings.²¹

²¹ The cases relied on by majority are distinguishable:

In People v Fagan, 66 NY2d 815; 498 NYS2d 335; 489 NE2d 222 (1985), and State v Alvey, 67 Hawaii 49; 678 P2d 5 (1984), the courts refused to apply collateral estoppel in a subsequent criminal case to an issue that was previously decided in a civil proceeding. The courts found that the prosecution in the criminal cases did not have a fair opportunity to litigate the issue in the earlier civil proceeding: "[T]he People's incentive to litigate a felony prosecution would presumably be stronger than in a parole revocation proceeding..." Fagan, supra, p 816. "[T]he disciplinary committee's investigative ability is limited." Alvey, supra, p 56.

In this case, the majority acknowledges that the issues were fully litigated during the probate court proceeding. See slip op, p 8.

In Thangavelu v Licensing Dep's, 149 Mich App 546, 555; 386 NW2d 584 (1986), lv den 425 Mich 864 (1986), the Court of Appeals affirmed a decision denying collateral estoppel effect in a civil case of an issue that had previously been decided in a criminal case. The Court said that "acquittal of criminal charges does not necessarily bar an administrative revocation proceeding based on the same issues, since a lesser degree of proof is utilized in the latter when making findings of fact." Thangavelu recognized that a judgment of acquittal in a criminal case, where the standard is proof beyond a reasonable doubt, does not fore-

(continued...)

The majority contends that applying the doctrine of collateral estoppel in the instant case would, in future cases, oblige a prosecutor to choose between commencing a criminal prosecution to vindicate the public interest in ascertaining guilt and filing a petition in probate court to protect the interests of the child.²² Reference is made to the so-called "42 day" rule set forth in MCR 5.972, which provides that if a child has been taken from the home, i.e., the child is "in placement," "the trial must commence as soon as possible but not later than 42 days after the child is placed by the court..." The majority argues that because of the forty-two-day rule, it would be "extremely difficult, and often impossible, for the criminal charges to be brought to trial in circuit court in advance of the jurisdiction determination in probate court."²³

The scheduling problem - which case to try first - can be resolved by agreement of the parties or by an amendment of the court

²¹ (...continued)

close the relitigation of the same issue in a civil proceeding where the lower preponderance of the evidence standard is applicable. In this case the sequence of cases is civil to criminal.

²² Slip op, pp 16-17.

²³ Slip op, p 15.

the parties or by an amendment of the court rules that this Court has the power to decree. The Court is currently considering a proposal to extend the timeframe from forty-two to sixty-three days.

Prosecutors are generally called upon to participate in an abuse/neglect proceeding.²⁴ When the prosecutor is intimately involved in the litigation, such that the prosecutor has a full and fair opportunity to litigate the issues in an abuse/neglect proceeding, and those issues are actually litigated in the probate proceeding and are the same issues sought to be litigated in a criminal prosecution, the doctrine of collateral estoppel should apply.²⁵

²⁴ "(A) General. On request of the prosecuting attorney shall review the petition for legal sufficiency and shall appear at any child protective proceeding..." MCR 5.914(A).

"[U]pon request of the department of social services ..., the prosecuting attorney shall serve as a legal consultant to the department...at all stages of the proceeding." 1988 PA 224, MCL 712A.17(5); MSA 27.3178(598.17)(5).

²⁵ If the prosecutor were to be called into a case by the court under MCR 5.914(A), but oppose the petition, then an argument might be made because the prosecutor's interest would conflict with that of the

(continued...)

The probate court is a court of record,²⁶ in contrast with an administrative agency.²⁷ The prosecutor generally represents the petitioner in a child-protective proceeding. The lawyers on both sides are likely to be the same in both the child protective proceeding and the criminal proceeding. This is not a case where the litigants did not have as strong an incentive to litigate in the earlier proceeding as they have in the later proceeding.

If the prosecutor does not participate in the probate court proceeding, application of the doctrine of collateral estoppel may be inappropriate because the prosecutor has not had a full and fair opportunity to litigate.²⁸

²⁵ (...continued)
petitioner. See 46 Am Jur 2d, Judgments, Section 532, p 686.

²⁶ MCL 600.801; MSA 27A.801.

²⁷ But see People v Sims, supra.

²⁸ The Court of Appeals in People v Watt, n 12 supra, p 179, People v Grainger, 117 Mich App 740, 753-754; 324 NW2d 762 (1982), and in this case, People v Gates, 168 Mich App 384, 387-388; 423 NW2d 668 (1988), said that because an administrative agency and a county prosecutor's office are "creatures of the same sovereign," there is sufficient privity between
(continued...)

The record does not substantiate the majority's assertion that the competence of the probate court to determine in a child-protective proceeding the criminal guilt or innocence of the parent "is necessarily compromised by the appropriate focus of the probate court on the protection of children."²⁹ The prosecutor in the instant child-protective proceeding focused entirely on the asserted criminal guilt of Gates. The prosecutor was not compromised. Nor was the probate court. The prosecutor simply failed to convince the jury. The prosecutor had his day in court. Gates should not be required to "run the gantlet" again.³⁰

²⁸ (...continued)

the parties to establish the "same parties" requirement for collateral estoppel.

These cases rely on United States v Wheeler, 435 US 313, 320-321; 98 S Ct 1079; 55 L Ed 2d 303 (1978). Wheeler may not, however, be applicable because the Double Jeopardy Clause does not apply unless there are two criminal prosecutions. See Sunshine Anthracite Coal Co v Adkins, 310 US 381, 403; 60 S Ct 907; 84 L Ed 1263 (1940), and State v Fritz, 204 Conn 156, 171-176; 527 A2d 1157 (1987).

²⁹ Slip op, p 17.

³⁰ Green v United States, 355 US 184, 190; 78 S Ct 221; 1 L Ed 2d 199 (1957); Ashe v Swenson, supra, p 446.

We would affirm the decision of the
Court of Appeals.

/s/ Charles L. Levin
/s/ Michael F. Cavanagh

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

No. 98229

GREGORY STEVEN GATES,

Defendant-Appellee.

BEFORE: R.M. Maher, P.J., and J.H. Shepherd
and K. Tertzag*, JJ.

PER CURIAM

Plaintiff appeals as of right from the order of the Jackson Circuit Court holding that the criminal prosecution of defendant for second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), was barred by collateral estoppel for the reason that a probate court jury had previously found, at an adjudicative hearing in that court, that defendant had not sexually abused the subject child. We affirm.

On February 18, 1986, a juvenile petition was filed in the Jackson County Probate

* Circuit Judge, sitting on the Court of Appeals by assignment.

Court requesting court intervention due to defendant's alleged sexual abuse of his daughter Nicole, who was then three years and ten months old. The petition alleged that sometime on or about February 13, 1986, defendant had touched Nicole's genitals for the purpose of sexual arousal or gratification. Prior to a preliminary examination on the petition, defendant was also charged in the Jackson County Circuit Court for second-degree CSC, arising from the same occurrence.

On June 16 and 17, 1986, a jury trial in the Jackson Probate Court was held on the juvenile petition. In his opening statement, the prosecutor explained that he would show that defendant had touched Nicole in a sexual manner and this warranted the probate court's jurisdiction and intervention.

During the prosecution's proofs, Nicole testified that she was asleep in a chair at defendant's home when he touched her hard in the vaginal area, awakening her. She also said that defendant told her not to tell her mother, from whom defendant was divorced and shared Nicole's custody, or the judge about the touching. A Catholic Social Services therapist testified that in her opinion Nicole had been sexually molested. Deborah Gates (Nicole's mother) and another social worker testified regarding the child's marked

mood change. No other evidence was presented to show neglect, cruelty, or defendant's unfitness to parent, aside from the alleged sexual touching.

The probate court instructed the jury that if it found by a preponderance of the evidence, that defendant's home was unfit for Nicole because of neglect, cruelty, criminality, or depravity by defendant then it should find that the court has jurisdiction over the child. The jury returned a verdict that the court did not have jurisdiction over Nicole. When polled, all six jury members agreed that they believed Nicole had not been neglected in the manner alleged by the Department of Social Services (DSS).

On June 20, 1986, the DSS filed a motion for judgment notwithstanding the verdict, which the probate court granted. That order was subsequently reversed by the circuit court and the juvenile petition was ordered dismissed.

On August 6, 1986, defendant moved to dismiss the criminal charges on the ground that the prosecution was barred by the doctrine of collateral estoppel. The trial court granted that motion and dismissed the second-degree CSC charges against defendant. This appeal of right followed.

The doctrine of collateral estoppel bars

the relitigation of issues previously decided where such issues are raised in a subsequent suit by the same parties based upon a different cause of action. People v Watt, 115 Mich App 172, 175; 320 NW2d 333 (1982), lv den 413 Mich 926 (1982). However, only those issues actually litigated in a prior litigation are conclusively decided for purposes of any subsequent action. Id.

The identical issue as presented herein was discussed by this Court in Watt, supra. There, the DSS terminated defendant's welfare benefits for the reason that she had committed fraud by failing to inform it that her ex-husband resided with her. Defendant challenged the termination of her benefits and a hearing officer found in her favor. The officer held that there was insufficient evidence that defendant's ex-husband resided with her, and consequently ordered that benefits be reinstated. The DSS did not appeal that decision. Thereafter, criminal charges were brought against defendant for the same acts and she was convicted of welfare fraud. On appeal, this Court overturned that conviction, noting among other things that (1) the burden of proof is higher in a criminal proceeding than in an administrative hearing, and (2) a county prosecutor and the DSS are "both creatures of the same sovereign, name-

ly, the State of Michigan." (Footnote omitted.) Id., p 179. See also, People v Grainger, 117 Mich App 740, 753-754; 324 NW2d 762 (1982); Anno: Doctrine of res judicata or collateral estoppel as barring relitigation in state criminal proceedings of issues previously decided in administrative proceedings, 30 ALR4th 856. Cf. Thangavelu v Dep't of Licensing & Regulation, 149 Mich App 546, 554-556; 386 NW2d 584 (1986), lv den 425 Mich 864 (1986); People v Bookmeyer, 127 Mich App 69, 71-72; 338 NW2d 557 (1983), lv den 419 Mich 854 (1984).

We hold that Watt, supra, is dispositive of this appeal. The basis of the juvenile petition against defendant was his alleged sexual abuse of Nicole. No other allegations of abuse, neglect, or unfitness were made or proven at the adjudicative hearing. Thus, the subject matter of the petition was the same as the criminal charge. Moreover, it is clear that the issue was fully litigated in the probate court as the DSS presented several witnesses in support of its case. Despite the DSS's efforts, the jury -- applying a lesser standard than required in a criminal proceeding -- did not find defendant guilty of the alleged sexual assault. Logic dictates that defendant could not be found guilty of the same misconduct under the high-

er standard of proof. Finally, we agree that the DSS and the county prosecutor, being creatures of the same sovereign, are the same party for purposes of collateral estoppel. For these reasons, the trial court correctly ruled that the doctrine of collateral estoppel barred defendant's prosecution on charges of second-degree CSC.

Our disposition of this issue renders it unnecessary to address defendant's claim that the prosecution was also prohibited by the double jeopardy clause of the United States Constitution. US Const, Am V & XIV.

Affirmed.

/s/ Richard M. Maher
/s/ John H. Shepherd
/s/ Kaye Tertzag

APPENDIX C

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF JACKSON

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

vs.

GREGORY STEVE GATES,
Defendant.

File #86-41238-FH

OPINION BY THE
COURT

Edward J. Grant (P14272)
Assistant Prosecuting Attorney

Nicholas Smith (P20697)
Attorney for Defendant

Defendant is charged in an Information in which it is alleged he committed criminal sexual conduct in the second degree on February 13, 1986. The alleged victim is the defendant's daughter, who was then three years, ten months old. Defendant has brought these motions:

1. A motion to dismiss on the grounds of collateral estoppel.

2. A motion to quash the information on grounds of lack of proof of the offense by competent testimony at the preliminary examination, and,

3. A motion for order authorizing independent evaluation of the alleged victim.

The motion to dismiss on grounds of collateral estoppel must be granted.

On February 18, 1986, a petition was filed in the Jackson County Probate Court alleging sexual contact with the daughter. The petition was amended prior to trial to allege that the touching of his daughter by the defendant "could be reasonably construed as being for purpose of sexual arousal" thus bringing the matter squarely within the terms of the criminal statute under which defendant is being prosecuted.

A trial by jury was held in probate court on June 16, 1986. At the trial, the alleged victim, her mother, Kathy Arnold, a social worker, and two other witnesses testified. The three named witnesses, and two others, are endorsed on the criminal information. The jury returned a verdict in favor of the defendant, determining thereby that the prosecution had not proved a case of sexual abuse by a preponderance of the evidence.

In the meantime, a criminal information was filed charging the defendant with criminal sexual conduct in the second degree on or about February 13, 1986.

On July 28, 1986, the probate judge granted the prosecutor's motion for judgment notwithstanding the verdict and ordered a new trial, on the issue of defendant's sexual abuse of his daughter. The probate court ruling was appealed to circuit court, and on October 6, 1986, the circuit judge entered an order granting the appeal, vacating the Order of July 28, 1986, and dismissing the petition in probate court.

It is unnecessary to discuss defendant's propositions 2 and 3.

Defense counsel shall prepare and submit an Order of Dismissal.

/s/ Russell E. Noble
Russell E. Noble,
Circuit Judge

Dated: December 3, 1986.

APPENDIX D
STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF JACKSON
PEOPLE OF THE STATE
OF MICHIGAN,
Plaintiff
v
GREGORY STEVE GATES,
Defendant

Case No. 86-41238-FH
Hon. Russell E. Noble

/

EDWARD J. GRANT, P14272
Chief Asst. Prosecuting Attorney
312 S. Jackson Street
Jackson, MI 49201

NICHOLAS SMITH, P20697
Attorney for Defendant
16000 W. Nine Mile, Ste. 114
Southfield, MI 48075
313-557-5599

ORDER OF DISMISSAL

At a session of said Court, held
in the Courthouse located in
Jackson County, Michigan, on
DEC 17 1986

Present: HONORABLE HON. GORDON W. BRITTEN
CIRCUIT JUDGE

This matter having come before the Court upon Defendant's Motion to dismiss on grounds of collateral estoppel; the Court having heard arguments of counsel for both parties and having entered its Opinion dated December 3, 1986, and the Court being fully informed

in the premises;

IT IS ORDERED that Defendant's Motion to Dismiss be and the same is hereby granted.

IT IS FURTHER ORDERED that the above-entitled cause is hereby dismissed.

IT IS FURTHER ORDERED that the bond is cancelled and the Defendant is hereby discharged.

/s/ Hon. Gordon W. Britten
CIRCUIT JUDGE (P11216)
In the Absence of Circuit
Court Judge Hon. Russell E.
NOBLE P18317

APPENDIX E

STATE OF MICHIGAN
THE DISTRICT COURT - COMPLAINT
JUDICIAL DISTRICT NO 12TH
COUNTY OF JACKSON CASE NO. 86774FY

THE PEOPLE OF THE Date of Offense On or
STATE OF MICHIGAN, about March 29, 1985
vs. through on or about
February 13, 1986

GREGORY STEVE GATES Location Leoni Town -
W/M DOB: 2-14-62 ship
137 Phillips Court
Michigan Center, MI Complainant Dep. James
#138-1732-86 Sager

Complaining Witness
Defendant(s) Dep. James Sager #5161

WITNESSES (*Preliminary Exam)

STATE OF MICHIGAN)
COUNTY OF JACKSON) ss.

The above-named COMPLAINING WITNESS
being duly sworn before the undersigned
Judge, Magistrate, or Clerk of the District
Court, upon the date indicated below, says
that heretofore on the DATE OF OFFENSE listed
above, at the LOCATION listed above in the
said County, State of Michigan, the above-

named Defendant(s),

did engage in sexual contact with
another person, to-wit: Nichole
Gates, said person being under 13
years of age; contrary to MCL 750.

520c(1)(a); MSA 28.788(3)(1)(a).

contrary to the form of the statute in such
case made and provided, etc.

WARRANT AUTHORIZED BY

/s/ Joseph S. Filip

P22920 Prosecuting Attorney

WHEREFORE, the said Complainant prays
that the said Defendant(s) may be apprehend-
ed and held to answer this Complaint and
further dealt with in relation to the same,
as law and justice may require.

Dated May 2, 1986

Subscribed and sworn
to on this day by

No. _____

/s/ Dep. J. Sager

Complaining Witness

/s/

Before the above-named Magistrate

APPENDIX F
AMENDED PETITION
STATE OF MICHIGAN
PROBATE COURT FOR THE COUNTY OF JACKSON
JUVENILE DIVISION

IN THE MATTER OF:

NICOLE GATES, HONORABLE
 FREDERICK SILL
 (P20459)
MINOR.

JEFFREY L. VICTOR (P36860)
Assistant Prosecuting Attorney
312 S. Jackson Street
Jackson, Michigan 49201
Phone: (517) 788-4283

NICHOLAS SMITH (P20697)
Attorney for Father of Minor
16000 W. Nine Mile, Ste. 114
Southfield, Michigan 48075
Phone: (313) 557-5599

PHILLIP H. BERKEMEIER (P28581)
Attorney for Mother of Minor
6692 Spring Arbor Road
Jackson, Michigan 49201
Phone: (517) 750-2292

JAMES S. TRECIAK (P21551)
Guardian Ad Litem
204-1/2 S. Jackson Street
Jackson, Michigan 49201
Phone: (517) 787-1972

AMENDED PETITION

Nicole Gates (DOB: 3-29-82)
Allegations: On or about February 13, 1986,
Nicole Gates was interviewed by the petition-

er, during this interview, Nicole Gates stated that her father had touched her "pee pee real hard". While stating this, Nicole showed petitioner what she meant by placing both of her hands on her vaginal area. Nicole further illustrated this while using the sexually explicit dolls by placing the adult male dolls hand on her (Nicole's) vaginal area. Nicole stated that when this occurred she had no clothes on.

It is also alleged that: This touching by the father could reasonably be construed as being for purposes of sexual arousal or gratification;

Nicole further revealed that she had not told her mother of her father's actions because she was afraid of what her father would do.

Due to the aforementioned information, I am respectfully requesting court intervention in this matter.

Respectfully submitted,

/s/ Jeffrey L. Victor P36860
JEFFREY L. VICTOR (P36860)
Assistant Prosecutor
312 S. Jackson Street
Jackson, Michigan 49201
Phone: (517) 788-4283

DATED: June 10, 1986

1

FILED

MAY 30 1990

Docket No. 89-1688

JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

October Term, 1989

GREGORY GATES,

Petitioner.

v

STATE OF MICHIGAN,

Respondent.

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

JERROLD SCHROTENBOER (P33223)
Chief Appellate Attorney
Jackson County Prosecutor's Office
312 South Jackson Street
Jackson, MI 49201
(517) 788-4286



QUESTION PRESENTED FOR REVIEW

WHETHER COLLATERAL ESTOPPEL, OUTSIDE THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE, PRECLUDES A CRIMINAL TRIAL WITH AN INDIVIDUAL CHARGED WITH SEXUALLY ABUSING HIS OWN DAUGHTER WHERE A PROBATE COURT JURY, INSTRUCTED THAT ITS ONLY CONSIDERATION IS WHETHER OR NOT THE HOME IS A FIT HOME FOR THE CHILD, RETURNED A "NO JURISDICTION" VERDICT.

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CITATION OF THE OPINIONS AND JUDGMENTS
DELIVERED IN THE COURTS BELOW

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People v. Gates, Jackson County
Circuit Court Number 86-41238-FH,
released 12/3/86.

STATEMENT OF THE CASE

Pursuant to Rule 24.2, respondent accepts petitioner's statement of the case except for the following additions.

Petitioner and his wife, Deborah Lynn Gates, were married on November 21, 1981. (Probate Court Adjudication Hearing Transcript [PATr], p. 339). Their daughter, Nicole Gates, was born on March 29, 1982. (PATr, p. 61). The couple, however, separated on December 27, 1984. (PATr, p. 63). They became legally separated in February 1985, when the Jackson County Circuit Court having jurisdiction over their divorce awarded the couple joint custody of Nicole. (PATr, pp. 108-109). From then until February 13, 1986, petitioner had physical custody over Nicole every weekend. (PATr, p. 62). During most of this time, petitioner lived with his parents in

Michigan Center, Michigan, just East of Jackson. (PATr, p. 336).

After the Michigan Department of Social Services filed the petition against petitioner alleging abuse and neglect (having sexually abused Nicole), Nicole lived with her mother. (PATr, p. 109). Petitioner's visitation also ceased. (PATr, p. 109).

At the preliminary examination held in the criminal case on May 27, 1986, Nicole testified that, more than once, while she was staying at petitioner's parents' home in Michigan Center, petitioner had touched her on her vagina in such a way as to make it hurt. (Preliminary Examination Transcript [PETr], pp. 42-44). Petitioner told Nicole not to tell her mother because she would therefore not let him see her again. (PETr, p. 46).

In binding the case over to the Jackson County circuit court for trial, Michigan's

Twelfth District Court Judge Robert Crary, Jr., stated: "I do think that something happened that caused her to be upset and caused her father to indicate that it might keep her from seeing him again, which indicates, I'm afraid, a sexual contact to the touching which occurred at this time." (PETr, pp. 77-78).

At the probate court Adjudication Hearing, Nicole reiterated her preliminary examination testimony that she had gone to sleep and had woken up when petitioner had touched her on her vagina. (PATr, pp. 40-41). She once again testified that petitioner told her not to tell anyone. (PATr, pp. 42-43). She testified that petitioner had touched her about five times in all. (PATr, p. 42).

Catholic Social Services Therapist Karen Marie Dupage testified that, in her expert opinion, Nicole had been sexually molested. (PATr, pp. 189-194). She had

noticed a very marked mood change in Nicole. (PATr, p. 218). Nicole's mother also noticed a personality change. (PATr, pp. 64-65).

In addition to the instructions mentioned in petitioner's petition, the probate court also instructed the jury as follows:

It is not necessary that each and every fact alleged in the petition be proven before you can find that the Court has jurisdiction of Nicole Gates. It is necessary, however, that sufficient facts be proven so that in your judgment you can find by a preponderance of the evidence that the home or environment of Nicole Gates was an unfit place for her to be by reason of neglect, cruelty, criminality, or depravity on the part of her father.

* * *

I do instruct you that this is a child protection case. It is not a criminal case. Therefore, the issue before you is not that of guilt or innocence but the issue is whether Nicole Gates comes within the jurisdiction of the Juvenile Division of the Jackson County Probate Court. You should not consider this proceeding to be in any way involved with the criminal law so far as your deliberations are concerned.

* * *

Now, there are only two possible verdicts in this kind of a case and I will give you a verdict form that gives you the two possible verdicts. You would either check the box on the top or the box on the bottom. The box on the top

says that the Court has jurisdiction of Nicole Gates. The box on the bottom says that the Court does not have jurisdiction of Nicole Gates, and you would check either one of those two boxes after you have reached a verdict. (PATr, pp. 431-432, 434, 436).

After the jury returned its no jurisdiction verdict, respondent, Guardian Ad Litem, and Nicole's mother's lawyer filed a motion for a judgment notwithstanding the verdict. On July 28, 1986, Jackson County Probate Court Judge Frederick O. Sill granted it. In making his ruling, he found that both Nicole Gates and Dupage had given reliable testimony. On the other hand, petitioner had not. Therefore, the only credible testimony presented was presented by respondent. (July 28, 1986, Probate Motion Hearing Transcript[28 Tr], pp.

10-11). Hence, because the jury's verdict was against the great weight of the evidence, Judge Sill entered an order granting a new trial. (28 Tr, p. 12).

This decision, however, was reversed by Jackson County Circuit Court Judge Gordon Britten on October 6, 1986. Petitioner had appealed to the Jackson County Circuit Court asking for leave to appeal and for a reversal. (Jackson County Circuit Court file number 86-42250-AV). In granting the application for leave to appeal and reversing Judge Sill's order granting the judgment notwithstanding the verdict, Judge Britten ruled that such a procedure denigrated petitioner's right to a trial by jury on the abuse and neglect petition. (September 26, 1986, Circuit Court Motion Hearing Transcript [26 MTr], pp. 12-13). He also found that, because the jury had no jurisdiction, Judge Sill did not have

jurisdiction to order the relief he had ordered. (26 MTr, p. 13).

ARGUMENT

BECAUSE COLLATERAL ESTOPPEL OUTSIDE THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE IS NOT A FEDERAL CONSTITUTIONAL DOCTRINE, PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED ESPECIALLY SINCE (1) GIVEN THE PROBATE COURT JURY'S INSTRUCTIONS, A FINDING THAT PETITIONER HAD NOT SEXUALLY ABUSED HIS DAUGHTER WAS NOT ESSENTIAL TO THE JUDGMENT AND (2) APPLYING COLLATERAL ESTOPPEL WOULD INCREASE CHILD MOLESTATION.

For three reasons, respondent asks this Court not to grant this petition for a writ of certiorari. First, petitioner is not presenting a federal constitutional claim to this Court. Because petitioner has never been criminally tried for this offense, double jeopardy does not bar trial. This Court has never ruled that the common law

doctrine of collateral estoppel, outside the Fifth Amendment Double Jeopardy Clause, is guaranteed by the United States Constitution. Second, the Michigan Supreme Court correctly ruled, given the jury instructions, that any finding that petitioner had not sexually abused his daughter was not essential to the judgment. The only issue presented to the probate court jury was whether or not Nicole's home was a fit home for her. By the time the trial was held, Nicole was living with her mother, not with petitioner. In fact, petitioner's visitation had ceased. Accordingly, the jury could have rationally found no jurisdiction even if it had believed that petitioner had sexually abused Nicole. Third, finding collateral estoppel will increase child molestation in Michigan. The Michigan court rules require an adjudication hearing within 42 days of the petition if the child is taken out of the

home. Because 42 days is not long enough in which to hold a criminal trial, if collateral estoppel applies, at least some Michigan prosecutors will (as happened between the Michigan Court of Appeals' decision and Michigan Supreme Court's decision in this case) prevent the Michigan Department of Social Services from filing a petition taking the child out of the home. Hence, if in fact abuse has occurred, it will continue.

First, petitioner has not validly invoked this Court's jurisdiction. He is not presenting this Court with a federal constitutional claim. This Court has never ruled that the entire collateral estoppel doctrine is guaranteed by the United States Constitution. Every time this Court has applied collateral estoppel, it has done so in the context of the Fifth Amendment Double Jeopardy Clause. In Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469

(1970), Simpson v. Florida, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971), Harris v. Washington, 104 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971), and Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972), the criminal defendant had first actually been acquitted. In the present case, on the other hand, petitioner has never been acquitted of anything. Instead, a probate court jury, in a civil proceeding, returned a verdict of no jurisdiction over his daughter. The Double Jeopardy Clause is not implicated. Accordingly, petitioner is not alleging a Federal Constitutional violation.¹

¹Respondent's point is graphically illustrated in Brown v. Ohio, 432 U.S. 161, 166, n6, 97 S.Ct. 221, 53 L.Ed.2d 187 (1977), where this Court characterized its ruling in Ashe, *supra*: "the Court [in Ashe] held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims."

In fact, this Court has specifically stated that the Double Jeopardy Clause does not apply unless both proceedings are criminal. In One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972), the criminal defendant was first acquitted of the criminal charges against him. He then claimed that the subsequent forfeiture action was barred by the Double Jeopardy Clause. This Court unanimously disagreed stating:

If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. "Congress may impose both the criminal and civil sanctions in respect to the same act or omission; for the Double

Jeopardy Clause prohibits merely punishing twice, or attempting to punish criminally the same offense."

* * *

Congress could and did order both civil and criminal sanctions, clearly distinguishing them. There is no reason for frustrating that design. Id. at 235-237.

The same is true in the present case. Michigan's abuse and neglect proceedings are not criminal in nature. Instead, they are civil. Michigan's Legislature has specifically provided for both remedies against child abuse. Not only may the State criminally prosecute someone who has sexually molested a child, but the State may also civilly take jurisdiction over the child in juvenile court and attempt to prevent future child abuse.

In fact, in Santosky v. Kramer, 455 U.S. 745, 764, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), this Court ruled that a person has no double jeopardy defense against repeated State efforts to terminate his parental rights. The same would apply to the actual adjudication hearing itself.

Accordingly, because the first proceeding was only civil, the Double Jeopardy Clause does not apply. Because this Court has never extended collateral estoppel beyond the Fifth Amendment Double Jeopardy Clause, petitioner is not claiming that his federal constitutional rights were violated.² Respondent asks this Court not to expand federal jurisdiction over a doctrine that has never before been declared constitutionally required. Petitioner asks

²Furthermore, the Michigan Supreme Court specifically decided not to address the Fifth Amendment Double Jeopardy Clause issue. 434 Mich. 154, n 6.

this Court not to so vastly expand federal constitutional jurisdiction in this country.

Second, the Michigan Supreme Court properly followed collateral estoppel doctrine by ruling that, after considering the jury instructions as given, under the facts of the case, any jury decision that petitioner had not sexually molested his daughter was not essential to the judgment. The Michigan Supreme Court correctly followed this Court's precedents for its ruling. In Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 195 (1877), this Court ruled that a reviewing court must look at what was actually litigated rather than what might have been litigated. Then, in Sealfon v. United States, 332 U.S. 575, 578-579, 68 S.Ct. 237, 92 L.Ed. 180 (1948), this Court ruled that the reviewing court must look at the jury instructions:

Thus, the only question in this case is whether the jury's verdict

in the [first] trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts educed at each trial and the instructions under which the jury arrived at its verdict at the first trial.

In the present case, the probate court judge specifically told the jury that petitioner's guilt or innocence was not what it had to decide. (PATr, p. 434). Instead, the jury was to decide "by a preponderance of the evidence that the home or environment of Nicole Gates was an unfit place for her to be by reason of neglect, cruelty, criminality or depravity on the part of her father." (PATr, pp. 431-432). As the Michigan Supreme Court correctly found, because Nicole was no longer living with petitioner (and he did not even have

visitation anymore), the jury could have faithfully followed the jury instructions and yet rationally concluded that the probate court had no jurisdiction even though petitioner had sexually molested his daughter:

The clear import of the [jury] instruction is that even if the jury believed that a criminal violation had occurred, it was not required to find the child's home or environment to be unfit so as to warrant jurisdiction. In short, a finding of innocence was not essential to a verdict of no jurisdiction; thus, the verdict did not "necessarily determine the issue of criminal guilt or innocence."

Furthermore, during the course of the trial the jury learned that the child's mother had exclusive physical custody of the child and that visitations with her father had ceased. The jury might have concluded on that basis alone that the child did not require the protection of the probate court. Thus the jury's verdict could rationally have been based on grounds other than a determination of defendant's innocence of the allegations in the petition. 434 Mich. 159-160.

Petitioner cites to no cases which mandate a collateral estoppel preclusive effect even though the jury instructions allowed the jury to make a decision on other grounds. Instead, this Court, in Sealfon and Cromwell, ruled the opposite. Accordingly, there is no need for this Court to grant

this petition for writ of certiorari in this case.

Third, as the Michigan Supreme Court correctly found, for policy reasons, collateral estoppel should not apply in this situation. The Michigan Supreme Court did not want to increase child molestation in this State. Instead, it wanted to reduce it. Accordingly, as an alternative holding, it found no collateral estoppel. According to Michigan Court Rules 5.972, a family has a right to an abuse and neglect adjudication hearing with 42 days after the conclusion of the preliminary hearing if the child has been detained. Because criminal trials most likely will not be commenced within 42 days, to avoid the preclusive facts of a collateral estoppel rule, the prosecution (or maybe even the Probate Court Judge or even the Department of Social Services itself) may decide to block the probate court proceedings until after the criminal

trial. Thus, whether there has been abuse or not, the child will remain in the abusive parent's (or parents') care for that period. Such a result is certainly not in either the child's or society's best interest. Hence, the Michigan Supreme Court correctly found no collateral estoppel.

It ruled:

The disparate purposes of the two types of proceedings argue strongly against the application of collateral estoppel. If we were to endorse the proposition that a determination of no jurisdiction in a child-protective proceeding operates to collaterally estop criminal charges, we would invite the risk that the proper functions of the two proceedings would be compromised.

* * *

To avoid the effect of collateral estoppel, if it were to be made applicable, a prosecutor would be required to develop criminal charges indicated by the petition and bring them to trial before a determination concerning jurisdiction could be reached in the probate proceeding. However, the burden of proving criminal charges beyond a reasonable doubt, added to problems presented by conflicting procedural and scheduling requirements of the two courts, would make it extremely difficult and often impossible for the criminal charges to be brought to trial in circuit court in advance of the jurisdiction determination in probate court.

Thus, the petitioner or the prosecutor would face an unfortunate choice that is not in the public interest: whether to proceed on the petition in probate court because of concern for the child, or to delay the probate proceeding because of concern that a verdict of nonjurisdiction would preclude criminal prosecution of the accused.

We are persuaded by public policy considerations that such an election between criminal and child-protective proceedings should not be judicially imposed through the application of collateral estoppel. 434 Mich. 162-163.

As it is, the Michigan Supreme Court is not the only court that has refused to apply

collateral estoppel doctrines to preclude criminal prosecution for policy reasons. Other Courts refusing to apply collateral estoppel are: Joiner v. State, 500 So. 2d 81 (Ala. Crim. App. 1986); In re Kathryn & Kimberly B., 126 Misc.2d 1085, 484 N.Y.S.2d 788 (1985), Gregory v. Commonwealth, 610 S.W.2d 598 (Ky 1980); Commonwealth v. 707 Main Corp., 371 Mass. 374, 357 N.E.2d 753 (1976); State v. Alvey, 67 Haw. 49, 678 P.2d 5 (1984); State v Dupard, 93 Wash. 2d 268, 609 P.2d 961 (1980); People v Fagan, 66 N.Y.2d 815, 498 N.Y.S.2d 335, 489 N.E.2d 222 (1985); State v. Walker, 159 Ariz. 506, 768 P.2d 668 (1989).

In fact, this Court itself has expressed reservations about applying collateral estoppel principles too strictly to preclude criminal prosecutions. Standifer v. United States, 447 U.S. 10, 100 S.Ct. 1990, 64 L.Ed.2d 689 (1980). Petitioner, on the other hand, has not even

addressed this point in his petition. He has completely ignored the Michigan Supreme Court's alternative holding. He is asking this Court to create a new constitutional right and then mechanically apply it even though Michigan would accordingly suffer more child molestation. Respondent asks this Court not to accept this invitation.

WHEREFORE, respondent asks this Court to deny this petition for writ of certiorari.

Respectfully submitted,


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Dated: May , 1990

